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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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BRENT SHIPP, et al.,

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Plaintiffs,

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v.

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LIBBY SCHAAF, et al.,

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Defendants.

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Case No. 19-cv-01709-JST

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Before the Court is Plaintiffs Brent Shipp and Eric De Guzman's motion for a preliminary injunction. ECF No. 7. The Court will deny the motion.

13 **I. BACKGROUND**

The City of Oakland has enacted ordinances recognizing "that a shelter crisis exists due to a 'significant number of persons . . . without the ability to obtain shelter, resulting in a threat to their health and safety.'" ECF No. 1-2 (February 13, 2019 memo from City Council President Rebecca Kaplan) at 1. As part of its response to this crisis, the City's Public Works Department has a Standard Operating Procedure ("S.O.P.") regarding the removal of homeless encampments from public rights-of-way, parks, and City-owned property. ECF No. 1-2 at 10. The S.O.P. contemplates that sometimes the belongings of occupants will be removed when encampments are cleared, and states that the S.O.P.'s "guidelines must be followed to protect the constitutional rights of persons whose personal property remains at these locations." *Id.* As relevant here, the required procedures include the following:

- A Notice to Vacate will be posted "in multiple visible locations at the area" at least 72 hours prior to the closure.
- "City personnel shall not prevent occupants from retrieving their belongings before

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1 vacating the encampment site.”

2 • “City personnel shall not confiscate or remove belongings from site when the
3 occupant is present, absent a reasonable belief that the belongings are an immediate threat to
4 public health and safety or are evidence of a crime or contraband.”

5 • “[The Public Works Agency] shall itemize the belongings collected and include the
6 location, date, and time of collection on the itemization form.”

7 • There is an exception to the previous paragraph for “belongings that are considered
8 to be clearly trash or are unsafe for storage, such as food or food wrappers, soiled items, or used
9 personal hygiene items.” Public works employees are directed to “immediately dispose of” such
10 items.

11 • “A ‘Notice of Collected Property’ will be posted where the original ‘Notice to
12 Vacate’ was previously posted, and will contain the [Public Works Agency] Call Center telephone
13 number.”

14 • Public Works will store the collected belongings at a Public Works facility for at
15 least ninety (90) days.

16 ECF No. 14-2 at 16-17.

17 The S.O.P. governs both permanent encampment closures and temporary “clean and clear”
18 operations, after which encampment residents are permitted to return to living at the site. ECF No.
19 14-1 at 4-5.

20 Plaintiffs Shipp and De Guzman are currently unhoused and live in an encampment located
21 at East 12th Street and 16th Avenue in the City of Oakland. They have lived in encampments in
22 other locations in the City from which they were evicted and their belongings seized. They allege
23 that the City violates its own policy by disposing of unhoused persons’ belongings improperly.
24 They “want the City of Oakland to follow their so called policy and stop throwing away people’s
25 belongings . . . [and] do the job they are paid to do & bag, tag and & store our belongings for 90
26 days.” ECF No. 1 at 5. They contend that the City’s actions violate their constitutional rights
27 under the Fourth, Eighth, and Fourteenth Amendments.

28 On March 29, 2019, the Department of Public Works posted a notice that public works

1 crews would “temporarily close the encampment” in the median on East 12th Street from 14th to
2 19th Avenues “between the hours of 8 AM and 4 PM” on Wednesday, April 3, 2019, or on the
3 next business day, “to clean the site thoroughly.” ECF No. 3 at 3. The notice further cautioned
4 that “[a]ny property left at this site at the time of cleanup will be removed from the site and stored
5 by Public Works. Property that is unsafe or hazardous to store will be discarded immediately.”

6 *Id.*

7 Plaintiffs filed this pro se action on April 2, 2019, and immediately moved for a temporary
8 restraining order and a preliminary injunction to prevent this temporary closure. ECF Nos. 1, 3, 7.
9 Given the imminence of the closure, the Court issued a temporary restraining order on an *ex parte*
10 basis that evening, enjoining the City from vacating Plaintiffs’ encampment for 14 days. ECF No.
11 11 at 5. The Court further ordered the City to show cause why a preliminary injunction should not
12 issue. *Id.* at 5-6. The City filed its response on April 8, 2019, ECF No. 14, and Plaintiffs did not
13 file a reply. At the hearing on April 16, 2019, Plaintiff De Guzman appeared on his own behalf
14 and offered testimony and argument.

15 **II. LEGAL STANDARD**

16 A plaintiff seeking a preliminary injunction “must establish that he is likely to succeed on
17 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
18 balance of equities tips in his favor, and that an injunction is in the public interest.” *Am. Trucking*
19 *Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat.*
20 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Injunctive relief is “an extraordinary remedy that
21 may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555
22 U.S. at 22.

23 To grant preliminary injunctive relief, a court must find that “a certain threshold showing
24 [has been] made on each factor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per
25 curiam). Assuming that this threshold has been met, “serious questions going to the merits and a
26 balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary
27 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and
28 that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,

1 1135 (9th Cir. 2011) (internal quotation marks omitted).

2 **III. ANALYSIS**

3 **A. Likelihood of Success on the Merits**

4 **1. Eighth Amendment**

5 Plaintiffs contend that the City’s practices violate their Eighth Amendment rights under
6 *Martin v. City of Boise*, No. 15-35845, -- F.3d --, 2019 WL 1434046, at *15 (9th Cir. Apr. 1,
7 2019).

8 The Eighth Amendment’s “Cruel and Unusual Punishments Clause circumscribes the
9 criminal process in three ways.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). “First, it limits
10 the type of punishment the government may impose; second, it proscribes punishment ‘grossly
11 disproportionate’ to the severity of the crime; and third, it places substantive limits on what the
12 government may criminalize.” *Martin*, 2019 WL 1434046, at *26. At issue here is the third
13 limitation, which the Supreme Court has cautioned must “be applied sparingly.” *Ingraham*, 430
14 U.S. at 667.

15 In *Martin*, the Ninth Circuit synthesized the relevant case law as articulating “the principle
16 . . . ‘that the Eighth Amendment prohibits the state from punishing an involuntary act or condition
17 if it is the unavoidable consequence of one’s status or being.’” *Martin*, 2019 WL 1434046, at *27
18 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *vacated*, 505 F.3d
19 1006 (9th Cir. 2007)). Applying this principle to a pair of ordinances that “criminalize[d] the
20 simple act of sleeping outside on public property” anywhere in the city of Boise, the Ninth Circuit
21 explained that, “as long as there is no option of sleeping indoors, the government cannot
22 criminalize indigent, homeless people for sleeping outdoors, on public property, on the false
23 premise they had a choice in the matter.” *Id.* at *27-28. In so doing, the Ninth Circuit emphasized
24 that its holding was “a narrow one”:

25 Naturally, our holding does not cover individuals who *do* have access
26 to adequate temporary shelter, whether because they have the means
27 to pay for it or because it is realistically available to them for free, but
28 who choose not to use it. Nor do we suggest that a jurisdiction with
insufficient shelter can never criminalize the act of sleeping outside.
Even where shelter is unavailable, an ordinance prohibiting sitting,
lying, or sleeping outside at particular times or in particular locations

might well be constitutionally permissible. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes.

Id. at *27 n.8 (citations omitted).

Martin's holding does not extend to the situation here. First, the City's decision to require Plaintiffs to temporarily vacate their encampment does not, by itself, implicate any criminal sanctions that would trigger Eighth Amendment protections. Nothing in the notice of temporary closure or elsewhere in the record suggests that the City intends to issue criminal sanctions as part of the temporary closure operation.

Rather, it appears from Plaintiffs' motion that the criminal sanction they fear is a citation or arrest for failing to vacate the encampment. ECF No. 7 at 4-5. The Court notes that there is no evidence in the record that the City has previously enforced temporary enclosures via citations or arrests. However, even assuming (as Plaintiffs do) that this might occur, remaining at a particular encampment on public property is not conduct protected by *Martin*, especially where the closure is temporary in nature. The Ninth Circuit was clear: “[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.” *Martin*, 2019 WL 1434046, at *27 (alteration in original) (quoting *Jones*, 444 F.3d at 1138). This is not a case where “homeless plaintiffs do not have a single place where they can lawfully be” within the City. *Id.* (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)). Faced with a similar motion seeking to enjoin the City on this basis, another court in this district has explained, “Plaintiffs are not faced with punishment for acts inherent to their unhoused status that they cannot control.” *Miralle v. City of Oakland*, No. 18-CV-06823-HSG, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018). The same is true here.

Because the temporary closure does not impose criminal consequences – even indirectly – in a manner prohibited by *Martin*, the Court need not find that Plaintiffs would have the “option of sleeping indoors” during this eight-hour period. *Martin*, 2019 WL 1434046, at *27; *see also*

1 *Miralle*, 2018 WL 6199929, at *2.

2 Accordingly, the Court concludes that Plaintiffs have not raised serious questions as to
3 their Eighth Amendment claim.

4 **2. Fourteenth Amendment**

5 Plaintiffs next assert that an injunction is necessary because – contrary to its official
6 policies – the City “has a pattern and practice of ‘unlawfully seizing and destroying personal
7 property that is not abandoned without providing any meaningful notice and opportunity to be
8 heard.’” ECF No. 7 at 6 (quoting *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027 (9th Cir.
9 2012)).

10 In *Lavan*, the City of Los Angeles “admit[ted] that it failed to provide any notice or
11 opportunity to be heard for [unhoused plaintiffs] before it seized and destroyed their property.”
12 693 F.3d at 1032. Los Angeles argued only that plaintiffs lacked a “constitutionally protected
13 property interest in unattended personal property left illegally on the public sidewalk,” *id.* at 1031,
14 a suggestion that the Ninth Circuit rejected.

15 Here, as the *Miralle* court recognized, the S.O.P. “on its face, provides adequate notice and
16 opportunity for Plaintiffs to be heard before property is seized.” *Miralle*, 2018 WL 6199929, at
17 *3; *see also Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084, at *4 (N.D. Cal.
18 May 2, 2016) (finding similar procedures “provided sufficient due process through advance notice
19 and will provide adequate post-seizure remedies”). The notice of temporary closure was posted on
20 March 29, 2019, more than 72 hours before the morning of April 3, 2019. ECF No. 14-2 at 45.
21 The notice warned occupants to remove all belongings; in the alternative, the City stated that it
22 would store property left at the encampment, so long as it was not “unsafe or hazardous to store.”
23 *Id.* Under the S.O.P., belongings are stored for at least 90 days, and a Notice of Collected
24 Property is posted at the encampment with information on how to retrieve stored property. ECF
25 No. 14-2 at 16.

26 At the hearing, Plaintiffs confirmed that their Fourteenth Amendment challenge is not to
27 the S.O.P. itself. Rather, Plaintiffs contend that the City does not actually comply with the S.O.P.
28 and is therefore unlikely to comply with it in the future. If the record contained evidence that the

1 City had repeatedly violated its own policies regarding the destruction of unhoused persons'
2 property, it would raise serious questions as to the merits of Plaintiffs' claim. However, the
3 declarations submitted by Plaintiffs are too general to meet this burden.

4 It is not sufficient to state, as Plaintiffs and their declarants do, that the City has sometimes
5 removed and destroyed encampment members' property. Sometimes the City has the right to do
6 this. The S.O.P. permits City personnel to "confiscate or remove belongings . . . [that] are an
7 immediate threat to public health and safety or evidence of a crime or contraband." ECF No. 14-2
8 at 17. Plaintiffs do not challenge these provisions, or the S.O.P.'s guidelines concerning the types
9 of items that the City stores versus those it confiscates and destroys. *Id.* at 21.¹ Therefore, when
10 the City confiscates and destroys property, it is not possible to conclude that there has been a
11 policy violation without knowing more.

12 Plaintiffs' declarations do not provide the "more." Two declarants, Jesse Turner and
13 Angel Diaz, both state that they witnessed the City improperly discard encampment residents'
14 belongings during closures, but do not provide any specific details from which the Court can infer
15 that the discarded items should have been stored instead. *See* ECF No. 6-2 at 2; ECF No. 6-3 at 2-
16 3. It is equally possible that the items in question were properly seized and destroyed because
17 they were unsafe, hazardous to store, or a threat to public health or safety, as it is that they were
18 not. Plaintiffs simply do not address that question.² And though Shipp and De Guzman report
19 that similar destruction occurred when the City closed their prior encampment on East 12th Street
20 and 23rd Avenue, their evidence is similarly too general for the Court to find that the City violated
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22 ¹ Pursuant to the City's guidelines, the Public Works Agency does not store items that are, among
23 other things, "dirty or soiled," "perishable," "contaminated," or "hazardous." ECF No. 14-2 at 21.
It also does not store bedding, pots and pans, or books. *Id.*

24 The Court notes as well that, to the extent that encampment residents disagree with the City's
25 decisions about which items can be stored, they have at least 72 hours to remove all items under
the City's policies.

26 ² Plaintiffs' declarants do identify some purportedly destroyed items that are on the City's
27 presumptive storage list. *See, e.g.*, ECF No. 6 at 3 (stereo system); ECF No. 6-1 at 2 (electronics,
bicycles). Nonetheless, the items may have been in a condition that subjected them to seizure
under the City's policies. *See* note 1, *supra*. Again, the declarations are silent on this point.

1 its policies in that instance. ECF No. 6 at 2-3; ECF No. 6-1 at 2.³ Against this evidence, the Court
2 weighs the City’s representations that it has consistently complied with its policies, either by
3 properly storing items or cooperating with encampment residents to remove all items that should
4 not be discarded. *See* ECF No. 14-2 at 5-6. Because the Plaintiffs’ declarations are so general,
5 there is nothing to contradict the City’s representations.

6 “To have standing to assert a claim for prospective injunctive relief, a plaintiff must
7 demonstrate ‘that he is realistically threatened by a repetition of [the violation].’” *Melendres v.*
8 *Arpaio*, 695 F.3d 990, 997 (9th Cir. 2012) (alteration in original) (quoting *City of Los Angeles v.*
9 *Lyons*, 461 U.S. 95, 109 (1983)). Where the threat of harm is not attributable to a written policy,
10 plaintiffs must generally “demonstrat[e] that the injury was part of a pattern of officially
11 sanctioned behavior.” *Allen v. County of Lake*, 71 F. Supp. 3d 1044, 1050 (N.D. Cal. 2014)
12 (citing *Melendres*, 695 F.3d at 997-98). In order to obtain a preliminary injunction, moreover,
13 “plaintiffs must make a clear showing of each element of standing.” *Townley v. Miller*, 722 F.3d
14 1128, 1133 (9th Cir. 2013). Because Plaintiffs have not met their burden of showing that the City
15 is violating its own policies, the Court cannot find a realistic threat that it will do so in the future.

16 Discovery in this case regarding the City’s past conduct, or evidence concerning future
17 “clean and clear” operations, may succeed in demonstrating that the City does not, in fact, comply
18 with its own policies. The Court will consider such evidence if it emerges. On the present record,
19 however, Plaintiffs have not met their burden of showing either a serious question going to the
20 merits or a likelihood of future harm. Given those failures, the Court need not address the
21 remaining factors. The Court will deny the motion for preliminary injunction.

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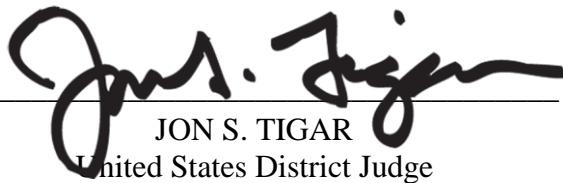
28 ³ At the Court’s invitation, De Guzman also gave testimony at the hearing on the motion. Though the Court considers that testimony, it does not provide material support for Plaintiffs’ claims.

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CONCLUSION

2 For the foregoing reasons, Plaintiffs' motion for preliminary injunction is denied.

3 **IT IS SO ORDERED.**

4 Dated: April 16, 2019

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6 JON S. TIGAR
United States District Judge